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JAN 13 2011

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF YAVAPAI

JEANNE HICKS, Clerk
BY Deputy

DIVISION PRO TEM B

HON. WARREN R. DARROW

By: Diane Troxell, Judicial Assistant

CASE NUMBER: V1300CR201080049

Date: January 13, 2011

TITLE:

COUNSEL:

STATE OF ARIZONA

Sheila Sullivan Polk
Yavapai County Attorney
Bill Hughes, Esq.
Steven Sisneros, Esq.
Deputy Yavapai County Attorneys

(Plaintiff)

(For Plaintiff)

vs.

JAMES ARTHUR RAY

Thomas K. Kelly, Esq.
425 E. Gurley
Prescott, AZ 86301

Luis Li, Esq.
Brad Brian, Esq.
Truc Do, Attorney at Law
Attorney at Law
MUNGER TOLLES & OLSON LLP
355 S. Grand Avenue, 35th Fl.
Los Angeles, CA 90071

(Defendant)

(For Defendant)

**UNDER ADVISEMENT RULING ON DEFENDANT'S MOTION IN LIMINE (NO. 2)
TO EXCLUDE EVIDENCE OF DEFENDANT'S FINANCIAL CONDITION
AND BUSINESS PRACTICES**

The Court has considered the Defendant's motion, the State's response, the reply and the arguments of counsel.

In its response to the motion in limine, the State expressed its intention to "introduce evidence of Defendant's business practices to include Defendant's sales practices and refund policy, the cost of the Spiritual Warrior Seminar and Defendant's financial status." The parties have apparently been unable to locate any case authority that addresses the specific issues presented in the motion in limine.

A. Evidence of Defendant's General Financial Status

Based on the statements of counsel at oral argument, it appears the State may not intend to offer evidence of the Defendant's and James Ray International's general financial condition. In any event, such evidence would have questionable relevance to the anticipated factual issues in this case and, at least with regard to the State's case-in-chief, would not be admissible after application of Rule 403 of the Arizona Rules of Evidence.

The charges in this case involve Mr. Ray's alleged knowledge and conduct relating to sweat lodge ceremonies; specifically, the State alleges that he was aware of a substantial and unjustifiable risk that the sweat lodge ceremony in October of 2009 would result in the death of participants but consciously chose to disregard this substantial and unjustifiable risk. Certainly, it is arguable that one reason for a person consciously to disregard a significant risk of such consequences could be for the purpose of financial gain. Thus, in an appropriate case evidence of the profitability of an activity might be relevant to prove a person's motive for conducting a dangerous activity or subjecting others to dangerous conditions, and this evidence of motive could in turn be relevant – or material – as proof as to whether the person consciously disregarded a known risk. Rule 401 of the Arizona Rules of Evidence.

As the Court is unaware of any published criminal case opinion addressing the specific issues presented here, the Court looked, as did the defense, to civil law in an attempt to find some assistance in dealing with the evidentiary issues. Perhaps somewhat analogous legal considerations are presented in tort cases involving claims for punitive damages. In Arizona punitive damages may be recovered by proving a "defendant's conscious disregard of 'a substantial risk of significant harm to others'" – a requirement that resembles the basic element of a charge of manslaughter. *Winter v. Southwest Desert Images, LLC*, 218 Ariz. 121, 130, 180 P.3d 986, 995 (App.2008) (citations omitted). In civil cases involving punitive damages, courts may preclude evidence of profits unless the jury has first determined that the plaintiff has met the burden of proof on the legal standard. See Cal. Civ. Code §3295(d). This Court determines that, based on the circumstances currently presented, it would be unfairly prejudicial for the jury to be able to consider profitability or financial condition in connection with its determination of whether the Defendant was aware of and consciously disregarded a substantial and unjustifiable risk that the activity would result in the death of another person.

This is not to say that specific evidence of a person purposely valuing profits over safety concerns would not be admissible on the question of recklessness or other culpable mental state. Again looking at civil law, in *Grimshaw v. Ford Motor Co.*, 119 Cal.App.3d 757, 174 Cal.Rptr. 348 (1981),

a products liability case involving the Ford Pinto, "Ford could have corrected ... at minimal cost" a design defect in the Pinto that the company knew would "expose consumers to serious injury or death." . . . The record included internal memoranda showing that the company was aware of the risks to consumers, "but decided to defer correction of the shortcomings by engaging in a cost-benefit analysis balancing human lives and limbs against corporate profits." . . . Under such circumstances, a "jury . . . could reasonably infer

that defendants acted in callous disregard of Plaintiffs' rights, knowing that their conduct was substantially certain to vex, annoy, and injure plaintiffs." . . . The court therefore upheld the jury's award of punitive damages.

Thompson v. Better-Bilt Aluminum Products Company, Inc., 171 Ariz. 550, 556-57,832 P.12d 203, 209-10 (1992). Unlike such direct evidence of mental state, evidence of profitability and general financial condition presents a high danger of unfair prejudice and confusion of the issues.

Furthermore, the Court has been provided with information indicating that Mr. Ray's income over the past several years has derived from various sources and activities, one of which may be the Spiritual Warrior seminars that include, among other events, a sweat lodge ceremony. It is not known to what extent sweat lodge activities may have contributed to the Defendant's overall financial condition. Even if it were possible to offer evidence going to that question, any probative value of that evidence would be substantially outweighed by the danger of unfair prejudice and confusion of the issues and by considerations of undue delay and waste of time. Therefore, evidence of the Defendant's general financial status is not admissible in the State's case-in-chief.

B. The Defendant's Business Practices to Include Sales Practices and Refund Policy

(1) Sales Practices

The State has cited no legal authority to support admissibility of evidence of a person's alleged "high pressure sales techniques" as evidence of recklessness in a manslaughter case. Such evidence would present a high danger of suggesting to the jury that a decision may be made on an improper basis. The jury's attention could be drawn from the actual anticipated issues in this criminal matter, issues involving proof of reckless conduct causing death, to what some persons might consider distasteful business practices. Evidence that amounts to personal perceptions and opinions regarding the Defendant's or JRI's sales practices is not admissible.

This does not mean that any statements or other direct evidence that may relate to Defendant's knowledge and portrayal of sweat lodge activities, including statements concerning the potential harm and other effects of such activities, is not admissible. Also, if there is direct evidence that a specific business or sales practice actually affected an alleged victim's manner of participation in the 2009 sweat lodge, the admission of such evidence may be allowed under Rule 403. Of course, admission of such evidence would still have to be in accordance with the other rules of evidence and with constitutional principles. The question of whether the state of mind of alleged victims could be relevant in this matter is discussed below.

(2) Refund Policy

If in fact the Defendant authorized a no-refund policy either personally or through JRI, such evidence, set forth as a general pronouncement, would not be admissible. It would be speculation as to whether a no-refund policy, in itself, had an effect on a particular person. Any specific evidence relating to the alleged victims may eliminate this speculative aspect, and admission of such evidence may be consistent with the requirements of Rule 403.

(3) Cost of the Spiritual Warrior Seminar

Evidence of the cost of the seminar, as well as the other evidence discussed above, involves the issue of the relevance of the state of mind of alleged victims. The Defendant argues that even if the State had evidence that adequately removed the "unfounded conjecture about the decedents' purported frame of mind," the State has not explained how such evidence would bear on Mr. Ray's mental state. As suggested at the outset of this ruling, this Court is not aware of authority directly relating to the various evidentiary issues that are being raised in this motion. It is clear, however, that there are circumstances in which the state of mind of a victim is relevant to the question of whether or not a defendant possessed the culpable mental state of recklessness.

In *State v. Jackson*, 187 Wis.2d 431, 523 N.W.2d 126 (App.1994) the defendant was convicted of first degree reckless homicide. The burden for the state was to prove "criminal recklessness," which "means that the actor creates an unreasonable and substantial risk of death or great bodily harm to another human being and the actor is aware of that risk"; the state also had to prove that circumstances showed the defendant's "utter disregard for human life." *State v. Blair*, 164 Wis.2d 64, 70-71, 473 N.W.2d 566, 569 (App.1991). *State v. Jackson* involved the death of the defendant's wife when the car she was driving hit a tree. The crash occurred during a high-speed chase involving the victim and the defendant. In *Jackson*, the court determined that hearsay evidence of the victim's fear of her husband was relevant to the victim's state of mind, and the victim's "state of mind was a key issue in the case."

It was the State's theory that the fatal crash was caused when Jackson chased Diane causing her to speed away from him because she feared him. If Diane had not been afraid of Jackson and if he had not been chasing her, she would not have been speeding and there would not have been a fatal crash. Consequently, evidence regarding Diane's state of mind shortly before her death is relevant to the fact Diane appeared to be fleeing from Jackson.

State v. Jackson, 187 Wis.2d at 436, 523 N.W.2d at 128-29. What is left unsaid in the *Jackson* opinion, but what may be inferred, is the court's determination that the defendant's awareness of the victim's fear of the defendant, such that the defendant was aware of the risk that the victim would flee from the defendant in a high-speed chase, is relevant to the issue of the Defendant's mental state of recklessness and utter disregard for human life. Moreover, if the victim had not been in fear of the defendant, but rather had just chosen to drive in a fast and reckless manner with the defendant merely following her, the defendant's apparent conduct in following the victim, even if such conduct was reckless as to other specific persons or the public in general, would not be the legal cause of the victim's death.

The question of whether or not evidence of the mental state of an alleged victim is relevant to the mental state of recklessness of a defendant is determined by a basic analysis of what constitutes proof of recklessness. In a manslaughter case in Arizona, a person acts recklessly if the State proves that he was aware of and consciously disregarded a substantial and unjustifiable risk that his conduct will cause the death of another person. "The risk must be of such nature and degree that disregard of such risk constitutes a gross deviation from the standard of conduct a reasonable person would observe in the situation." A.R.S. §13-105(10)(c). Thus, if a defendant is aware that a particular mental state of another


person will result in the other person being placed at such a risk by the conduct of the defendant, the mental state of the other person is relevant to the question of whether the defendant acted recklessly.

Although it is possible for someone to envision situations, such as in the *Jackson* case, in which the mental state of a victim is clearly relevant to the mental state of a defendant, the specific issues of relevance and materiality under consideration in this motion in limine concern the cost of the Spiritual Warrior Seminar. The State argues that what it believes to be the high cost of the seminar (and apparently a "no-refund" policy as well) would create a mental state in the victims such that they would participate, despite extreme and dangerous physical hardship, out of a desire to get the full value of their investment. Logically, in order to prove recklessness, the State must also prove that the Defendant was aware of this mental state in the alleged victims and was aware that this mental state would subject the alleged victims to a substantial and unjustifiable risk of death. During oral argument the State also maintained that evidence of the cost of the seminar is necessary to a fair presentation of background information.

The Defendant points out that at least one deceased person did not have to pay to participate in the Spiritual Warrior activities. Also, the sweat lodge ceremony was only one of a number of activities during the week, and there is no way to attribute to the sweat lodge ceremony a particular portion of the overall cost for the seminar and retreat, which would include items such as lodging, meals, other sessions, and other expenses. Thus, the defense basically argues that even if, when viewed in the abstract, evidence of a victim's mental state of wanting to "get their money's worth" would be material to the issue of the Defendant's mental state, the State cannot show that evidence of the cost of the seminar is relevant to the actual mental state of the decedents.

Even taking into consideration the nature of the location of the event, the cost of the Spiritual Warrior Retreat is significant. The Court notes that there is legal significance in charging participation or admission fees for such things as performances, recreational activities, athletic events, and entry to premises. The jury should be allowed to consider any significance of such evidence in this case. Through cross-examination, argument or presentation of evidence, the defense can appropriately convey its position regarding such evidence. The Court also determines that the probative value of this evidence would not be substantially outweighed by the danger of unfair prejudice or the other factors listed in Rule 403. As noted by the State, this evidence is in the nature of background information that could assist the jury in understanding the general context of events in this case. Evidence of the cost of the Spiritual Warrior Retreat is therefore admissible.

DATED this 13th day of January, 2011.


Warren R. Darrow
Superior Court Judge

cc: Victim Services Division